Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1550

LANE PROCESSING, INC.,
Petitioner,

versus

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

LANE PROCESSING, INC.,
Petitioner,

versus

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on December 5, 1979.

OPINIONS BELOW

The District Court for the Western District of Arkansas, Ft. Smith Division, rendered a judgment and

Memorandum Opinion on March 13, 1979 in favor of Lane Processing, Inc. denying the requested injunction by the Secretary of Labor. The opinion of the United States Court of Appeals for the Eighth Circuit reversing the Trial Court's Order was rendered on December 5, 1979.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) Review is sought of the judgment of the United States Court of Appeals for the Eighth Circuit entered on December 5, 1979 (copy thereof is appended to this Petition at Pages 1a-2a.) The Court's Opinion bearing the same date is appended to this Petition at Pages 3a-12a.

(ii) 28 U.S.C.A. 1254(1) confers on this Court jurisdiction to review the judgment in question by Writ of Certiorari.

THE QUESTION PRESENTED

Whether a United States Court of Appeals under the Fair Labor Standards Act can abandon the principles found in *Walling v. Youngerman-Reynolds Hardware Co., Inc.* and hold that it is an abuse of discretion for the Trial Judge to deny an injunction when there is an uncontroverted evidence of good faith attempts of past compliance, assurances of future compliances and institution of a complex system to prevent future violations.

STATUTE INVOLVED

The statutory provisions involved are 29 U.S.C. §212(c), 215(a)(4), 217.

STATEMENT OF THE CASE

On June 28, 1976, the Secretary of Labor instituted an action against Lane Processing, Inc., requesting injunctive relief pursuant to §17 of the Fair Labor Standards Act. The Complaint alleged that Lane Processing, Inc. had employed persons under the age of 16 years since June 28, 1974.

Lane Processing, Inc., is engaged in chicken processing operations in Grannis, Arkansas and Broken Bow, Oklahoma. It is conceded that the Petitioner falls within the purview of the Act. Throughout the entire proceedings Lane Processing, Inc. has admitted to unintentional past violations of the Fair Labor Standards Act.

In 1975, a representative of the Labor Department investigated the Grannis and Broken Bow locations of Lane Processing, Inc. At the conclusion of those investigations, and upon discovering violations of the Fair Labor Standards Act, the Labor Department representative instructed representatives of Lane Processing, Inc., that they were to discontinue hiring anyone under the age of sixteen. At that time the Lane Process-

ing, Inc., representatives agreed to follow the instructions of the Labor Department.

As an immediate manifestation of Lane Processing, Inc.'s desire to comply with the requirements of the Fair Labor Standards Act, notices of the requirement of such law were posted for the benefit of the employees of Lane Processing, Inc. and were sent to all supervisors. These notices were posted and circulated among the supervisors and employees for the purpose of making them aware that the law requires each job applicant and each employee to be at least age sixteen. Shortly thereafter, John D. Bassinger was hired by Lane Processing, Inc. and one of his primary duties was to insure compliance with the Fair Labor Standards Act. In order to guarantee that Lane Processing, Inc., was at that time currently complying with the Act, Bassinger went through the employment records of the company and required all employees to present some document (e.g. Birth Certificate, Record of Baptism, School Records, etc.) which would prove the age of the employee. At both plant locations, any employee found to be in violation of the Act was immediately dismissed from further employment. The system instituted required that job applicants would not be hired unless they have such proof of age, and every application is reviewed by Mr. Bassinger to assure that applicants have such proof. Subsequent to the adoption of this system supervisors were not allowed to hire anyone without the knowledge and consent of Mr. Bassinger.

At the conclusion of the evidence the Trial Judge for the United States District Court, Western District of Arkansas, Ft. Smith Division entered an Order denying the requested injunction. Thereafter an appeal was perfected by the Secretary of Labor to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit reversed the Judgment of the District Court with directions to grant the injunctive relief.

REASONS FOR GRANTING THE WRIT

The judiciary has uniformly applied the following two prong test in injunction cases (1) Did the alleged violation occur, and (2) Likelihood of future violations. Likewise, in proceedings to enjoin violations of the Fair Labor Standards Act, the Trial Court has broad discretion as to the granting or denial of such relief, which will not be interfered with unless an abuse of such discretion is shown. *Mitchell v. Lublin, McGaughy & Associates,* 358 U.S. 207, 79 S.Ct. 260; *Lenroot v. Kemp,* (CA5 Miss.) 153 F.2d 153; *Brennan v. City Stores, Inc.,* (CA5 Ala.) 479 F.2d 235, reh. den.; *Hodson v. American Can Company,* (CA8 Ark.) 440 F.2d 916.

Throughout the proceedings, Lane Processing, Inc. has candidly admitted to unintentional past violations. However, a review of the record indicates constant revisions in its employment scheme at the processing plants which have finally led to a sophisticated compliance system requiring each employee to be screened and produce documentation of his or her age.

The Eighth Circuit cites four cases as authority for holding that the Trial Court in the present situation abused its discretion in denying the requested injunction. *Brennan v. Correa*, 513 F.2d 161, 163 (8th Cir. 1975); *Goldberg v. Kickapoo Prairie Broadcasting Co.*, 288 F.2d 778, 782 (1961); *Tobin v. Anthony-Williams Mfg. Co.*, 196 F.2d 547, 551 (1952); *Lenroot v. Interstate Bakeries Corp.*, 146 F.2d 325, 327 (8th Cir. 1945). A careful review of these decisions clearly indicates that their holdings are directly in conflict with the present decision by the Eighth Circuit.

(1) *Brennan v. Correa* — This case involved violations of the Child Labor provisions of the Fair Labor Standards Act. The Court stated "the record indicates that Correa instituted no measures sterner than oral directives against his two primary supervisors. This Court concludes that the record provides an insufficient factual basis for a reasonable belief that violations of the Act will cease. The Trial Court's dismissal of the Secretary's Complaint was an abuse of discretion."

(2) *Goldberg v. Kickapoo Prairie Broadcasting Co.* — This case involved violation of the record keeping and compensation provisions under the Fair Labor Standards Act. The Court held that it was an abuse of discretion for the Trial Judge to deny the requested injunction when: "The violations were known to the defendant and yet no corrective measures or other indications of good faith were taken or made."

(3) *Tobin v. Anthony-Williams Mfg. Co.* — This case involved violations of overtime compensation requirements of the Fair Labor Standards Act. The Court held that when: (a) Employer admittedly violated record keeping provisions of the Fair Labor Standards Act and (b) no showing was made to the Federal District Court as to what would be done by employer to bring employer's records into conformity with requirements of the Act and (c) no officer of employer stated that employer would or would not comply and (d) the only showing of intention to comply was a statement made by employer's attorney, then the Federal District Court abused its discretion in refusing to grant the request of the Secretary of Labor for an injunction under the Act.

(4) *Lenroot v. Interstate Bakeries Corp.* — This case involved violations of the Child Labor Provisions of the Fair Labor Standards Act. The Court held: "The proof made constituted cause shown . . . to restrain violation of §15 within the meaning of §17 of the Act in the absence of satisfactory evidence that there had been such change in conditions, personnel or method of employing and keeping a check on operations as to assure discontinuance of the violations in the Kansas City Plant."

This Honorable Court has adopted the same principles in *Walling v. Youngerman-Reynolds Hardware Co., Inc.*, 325 U.S. 419.

In the case at Bar the Eighth Circuit has discarded the second part of the previously stated two prong test by ignoring the uncontroverted good faith efforts on the part of Lane Processing, Inc. to effectively eliminate the violations by the adoption of a complex employment system suggested by Compliance Officers of the Department of Labor.

CONCLUSION

Accordingly, a Writ of Certiorari should issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit, and, after briefing and argument, that Judgment should be reversed.

Respectfully submitted,

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Charles J. Hlavinka

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this the ____ day of April, 1980, three true and correct copies of the above and foregoing Petition for Writ of Certiorari were placed in the United States mail, postage prepaid to Carin Ann Clauss, Solicitor of Labor, Ronald G. Whiting, Associate Solicitor, Paul E. Myerson, and Douglas J. Davidson, Counsel for Employment Standards, Room N2464 N. S. Department of Labor, 200 Constitution Avenue, N.W., General Legal Services, Washington, D.C. 20210.

Charles J. Hlavinka

APPENDIX

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
SEPTEMBER TERM, 1979

No. 79-1362

Ray Marshall, Secretary of Labor,
United States Department of Labor,
Appellant,

versus

Lane Processing, Inc.,
Appellee.

Filed: Jan. 4, 1980

APPEAL FROM the United States District Court for the Western District of Arkansas.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the Western District of Arkansas and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now and here ordered and adjudged by this Court, that the judg-

ment of the said District Court, in this cause, be, and the same is hereby, reversed and the judgment of the District Court is vacated with directions to grant the injunctive relief.

December 5, 1979

A true copy. Attest:
/s/ ROBERT D. ST. VRAIN,
U.S. Court of Appeals, 8th Circuit.
January 2, 1980.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

RAY MARSHALL, Secretary of Labor,
United States Department of Labor

versus CA No. FS-76-117-C

LANE PROCESSING, INC.

Filed: March 13, 1979

ORDER

Pursuant to the Court's Memorandum Opinion filed herein this date and in accordance therewith,

IT IS ORDERED that no injunction should issue but that defendant Lane Processing, Inc. be, and it is here-

by, put on notice to take every reasonable precaution that it obey the Fair Labor Standards Act.

This the 13th day of March, 1979.

/s/ PAUL X. WILLIAMS
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

(Number and Title Omitted)

Filed: March 13, 1979

MEMORANDUM OPINION

On June 28, 1976 the Secretary of Labor filed complaint against the defendant, Lane Processing, alleging violation of Fair Labor Standards Act of 1938 by employing oppressive child labor and seeking an injunction.

Defendant on July 26, 1976 filed answer in which it admits there were isolated unintentional violations and contends they were not oppressive and that no injunction should issue.

After discovery was complete, there was a trial to the Court on June 22, 1978 at which stipulations were filed, past violations were admitted by Lane and witnesses testified in person. Dean Speer, Bennett Wood, and William Howard Smith (all compliance officers) testified to past inspections and violations which were admitted by defendant.

Defendant offers evidence to the effect that Lane has built its business by hard work and great effort from a very small business to its present size — that Clift Lane and his wife, Dorothy, have worked diligently and that the past violations are in the main the employment of local children who needed the pay and children of adult employees who supervised their own children. Lane makes no effort to deny past violations, but contends that it is making a sincere effort to comply with all Government regulations including the Fair Labor Standards Act; that an injunction is not required and that an injunction would be a handicap and an unnecessary burden to have in its business.

The evidence clearly shows many technical violations. It also shows a bona fide effort on the part of Lane to remedy the situation. It also reveals that Mr. and Mrs. Clift Lane have built a large, profitable and tax paying business by industry and great personal endeavor. Their story is an inspiration to young Americans who desire to establish their own business and are willing to work.

At the conclusion of all evidence, the Court announced from the bench that the number of past violations seemed to indicate that an injunction should issue while on the other hand the lack of wilfull violations in recent years indicated that no injunction was required.

The plaintiff cites and relies on the following cases: *Brennan* v. *Correa, Jr., dba Ricardo's Mexican Enterprises of Ohana*, 76 Labor Cases ¶ 33,230 (8th Cir. 1975); *Goldberg* v. *Kickapoo Prairie Broadcasting Co.*, 288 F.2d 778 (8th Cir. 1961); *Lenroot* v. *Interstate Bakeries Corporation*, 146 F.2d 325 (8th Cir., 1945); *Shultz* v. *Salinas*, 416 F.2d 412 (5th Cir. 1969).

On the other hand Lane contends that the violations have ceased, are not likely to re-occur and, therefore, an injunction should not be entered.

43 CJS Sec. 25 contains the following language:

> "Injunctive relief will not lie to prevent that which in good faith has been discontinued, in the *absence of any evidence* that the acts are likely *to be repeated* in the future, and a suit for injunctive relief may be *moot if defendant can demonstrate* that there is no reasonable expectation that the wrong sought to be enjoined will be repeated. . . . as a prerequisite to injunctive relief, there must be a determination that there exists some cognizable danger of recurrent violation, something more than the mere

possibility which serves to keep the case alive." (emphasis added)

See also the following:

U.S. v. W. T. Grant Co., 345 U.S. 629.

In an earlier suit under the Fair Labor Standards Act, the government sought an injunction to stop violation of overtime and record-keeping provisions. Before trial, the defendant entered into a new contract with its workers and thereby ceased using its allegedly illegal mode of operation. The Supreme Court stated the general rule:

> "While voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial powers, . . . it may justify a court's refusal to enjoin future activity of this nature when it is combined with a bona fide intention to comply with the law and not to resume the wrongful acts." *Walling v. Youngerman-Reynolds Hardware Co., Inc.*, 65 S.Ct. 1242, 325 U.S. 419, 89 L.Ed. 1705 (Sup., 1945)

The Court held that no abuse of discretion by the trial court was shown in refusing to grant the injunction.

In a case arising in Arkansas, *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir., 1970) the issue concerned racial discrimination under Title VII of the Civil Rights Act of 1964. Southwestern Bell's conduct from 1965 to 1967 conclusively showed a violation of Title VII; however, in 1967 an effective policy was instituted in an attempt to comply with the act. The plaintiff brought action seeking relief individually and an injunction against the company's unlawful employment discrimination practices, before the new policy had been put into effect. On the question concerning the injunction, the Court said:

> "The Company's record over the past three years [under its new policy] is impressive and salutory. This court recognizes that the [defendant] has shown considerable progress under its affirmative action program adopted in 1968. The thrust of this program, in seeking minority group individuals for employment, tends to overcome the discrimination built into the previous recruitment system. The record also shows that the Company's management personnel have undertaken greater supervision and implementation of its employment policies and programs.
>
> In view of this evidence, we agree with the trial court that no injunction seems necessary or appropriate in this case at the present time." *Parham v. Southwestern Bell*, supra at page 429.

In another case in the U.S. District Court of Arkansas, Western District, the defendant had violated regulations by the Secretary of Army which concerned commercial boating operations on a government reservoir. On a summary judgment determination, the Court stated that affidavits of the defendant disclosed a good faith attempt to abide by the regulations in the future (the defendant admitted past violations), and that if such statements were true, then, when considered with the court's reluctance to grant injunctions against general violations of a statute or regulation, they may militate against the granting of an injunction unless it is shown that a reasonable likelihood exists that the defendant will revert to his former actions. *U.S. vs. Weaver*, 122 F.Supp. 577 (D.C. Ark., 1954).

"Injunction is an extraordinary remedy, . . . one which is reserved for really extraordinary cases." *43 C.J.S.* "INJUNCTIONS" §2.

In the case of *The Greater Iowa Corp. v. McLendon*, 378 F.2d 783, (8th Cir., 1967) involving an action by stockholders against the corporation for violation of the Security Exchange Act in regard to the issuance of preliminary injunction, the Court stated:

> "Injunctions are extraordinary legal remedies and are granted sparingly and under strict rules for the protection of all parties."

Again in *43 C.J.S.* "INJUNCTIONS" §15 at Page 777,

> "It has been said that there is no power the exercise of which is more delicate, requires greater caution and deliberation, or is more dangerous in a doubtful case, than the issuing of an injunction."

The Arkansas Supreme Court has expressed in several opinions its view on the nature of injunctive relief. The case of *Comer v. Woods*, 210 Ark. 351 (1946), concerned an action to enjoin the defendant from interfering with the plaintiff's possession of land. The Court quoted from *28 American Jurisprudence Page 199* §5:

> "Injunction is primarily a preventive remedy. Its province is to afford relief against future acts which are against equity and good conscience, and to keep or preserve a thing in status quo, rather than to punish for wrongful acts already committed. Generally speaking, rights already lost and wrongs already perpetrated cannot be corrected by injunction."

Not only does the Court look to the act to be enjoined, but also to the effect on the parties. *City of El Dorado v. McHenry*, 239 Ark. 232 (1965) where the City sued to enjoin owners of a building to stop obstructing the flow of water through a drain under the building. Citing *43 C.J.S. INJUNCTIONS §30 Page 462*, the Court stated,

"Ordinarily, on application for injunction the Court will in the exercise of the wide discretion with which it is vested take into consideration the relative inconvenience or injury which the parties will sustain by granting or refusal of the application for an injunction."

"That injunctive relief of a court of equity cannot be involved where there is an adequate remedy at law is so settled that the mere statement of the rule is sufficient." This fundamental was expressed by the Arkansas Supreme Court in 1931 in *Special School District No. 50 v. Deason*, 34 S.W.2d 1084. It would certainly appear that the civil penalty under 29 U.S.C. Sec. 216 would be an adequate remedy at law. According to 43 C.J.S. INJUNCTIONS §31a, the general rule is that no injunction will issue where the "remedy for any particular wrong or injury has been provided by statute." "Constitutional objections being eliminated, a court will not intervene merely to better such remedy which the legislature has deemed sufficient. . . ."

At the time of the trial, the Court indicated its curiosity as to precisely what harm would come to the Defendant by the issuance of an injunction in light of the fact that the Defendant in any case intends to comply with the act. Testimony was put on to the effect that the Defendant did much in the way of charity work, such as the building of rodeo arenas, hospitals, etc., and that the building of a public image enhanced

sales. The Defendant has enjoyed a long reputation of good standing within the community surrounding his plants, and as well within the poultry industry as a whole. Indeed evidence was offered tending to show that a former President of the United States, Gerald Ford, commended the Defendant for his employment of the young.

In addition to the harm to the image of this Defendant, one further matter needs to be considered by the Court. Granting an injunction could have an adverse effect on the ability of this Defendant to obtain loans.

The Court is aware that, in a business such as Lane, it is necessary in order to purchase grain, to build new facilities, etc., for Lane to borrow money periodically. On such occasions it is necessary that Lane furnish to the lending institutions a statement of financial condition. All such statements of financial condition reflect that claims and lawsuits are filed against or pending against the proposed borrower. If an injunction is granted against Lane, as a matter of accounting practice, it will appear on the financial statement that it is currently enjoined from engaging in any oppressive child labor practices." Such a notation could have a chilling effect and unnecessarily handicap Lane in its efforts to conduct business.

When all factors are considered, the Court finds that no injunction should issue at this time. This does not mean that all proof in this case has been forgotten, but

rather Lane will be put on notice that this opinion is a Caveat for Lane to take every reasonable precaution that it obey the Fair Labor Standards Act.

The Clerk will prepare order and embody the Caveat.

Dated this 13th day of March, 1979.

/s/ PAUL X. WILLIAMS
Paul X. Williams

Supreme Court, U. S.
FILED
APR 15 1980
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1550

LANE PROCESSING, INC.,
Petitioner,

versus

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1362

Ray Marshall, Secretary of Labor,
United States Department of Labor,
Appellant,

versus

Lane Processing, Inc.,
Appellee.

Appeal from the United States District Court for the Western District of Arkansas

---

Submitted: November 5, 1979
Filed: December 5, 1979

Before LAY, BRIGHT, McMILLIAN, Circuit Judges.

LAY, Circuit Judge.

The Secretary of Labor appeals from the denial of injunctive relief sought under section 17 of the Fair Labor Standards Act, 29 U.S.C. §217. The Secretary sought to enjoin the defendant Lane Processing, Inc. from fur-

ther violations of the child labor provision of the Act. 29 U.S.C. §§212(c), 215(a)(4). The original complaint alleged that the defendant had employed "oppressive child labor" in violation of the Act since June 28, 1974, by employing persons under 16 years of age.[1] We reverse and vacate the judgment of the district court with directions to grant the injunctive relief.

Lane Processing, Inc. is engaged in chicken processing operations in Grannis, Arkansas and Broken Bow, Oklahoma.[2] It is conceded that the defendant falls within the purview of the Act. Defendant has a long history of violations of the Act. As far back as 1968, defendant was employing minors in its Grannis plant. In 1973 a compliance officer discovered six minors employed in violation of the Act. Defendant was warned about the violations at that time and it promised future compliance. Again in May of 1975 defendant was investigated and 13 to 16 employees were found to be minors. Again defendant was warned and it promised future compliance. A follow-up investigation in October of 1975 revealed that approximately 51

1 "Oppressive child labor" is defined by 29 U.S.C. §203(1) to mean "a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer . . . in any occupation, ..."

2 Pursuant to authority granted in Section 3(1) of the Act, the Secretary of Labor has determined that minors between the ages of 14 and 16 years may be employed in certain occupations. Their employment must be confined to the periods specified in the regulations, 29 C.F.R. §570.35(a), which were found not to interfere with their schooling or with their health and well-being. 29 C.F.R. §570.31. While some occupations are exempt from the prohibition against the employment of "oppressive child labor," it is clear that "processing" is not among them. 29 C.F.R. §570.33(a).

minors had been employed in violation of the Act including the 13 to 16 previously discovered. Three minors had been employed subsequent to the May 1975 warning and promise of future compliance. Again the violations were explained by a compliance officer, and the defendant again promised future compliance. A final review of the Grannis plant in 1977 disclosed that two minors had been illegally employed since the last review.

A similar series of repetitive violations was found at the Broken Bow plant. A review in November of 1974 disclosed that 137 minors had been employed in violation of the Act during 1973-1974. The violations were explained to defendant but with few results. An investigation in October of 1975 revealed that 50 minors had been illegally employed subsequent to the meeting with defendant the previous year. Again the violations were discussed and once more defendant promised future compliance. A final investigation of the Broken Bow plant disclosed 23 minors who had been employed in violation of the Act subsequent to the defendant's 1975 promise of compliance. Eight of the 23 minors had been illegally employed during a previous investigation. Defendant had been notified at the time of the earlier investigation that these 8 minors were illegally employed.

The district court in determining whether to enjoin an employer from further violation of the Act must

exercise its discretion to accomplish the Act's objective of abolishing oppressive child labor. *See Brennan v. Correa,* 513 F.2d 161, 163 (8th Cir. 1975). The employer's previous noncompliance is a fundamental criterion in making such determination. In the present case, the Secretary, after repeated assurances of compliance received from defendant and violations of the same, has determined that there exists no reasonable belief that future violations of the Act will not occur. *Brennan v. Correa,* 513 F.2d 161, 163 (8th Cir. 1975); *Goldberg v. Kickapoo Prairie Broadcasting Co.,* 288 F.2d 778, 782 (1961); *Tobin v. Anthony-Williams Mfg. Co.,* 196 F.2d 547, 551 (1952); *Lenroot v. Interstate Bakeries Corp.,* 146 F.2d 325, 327 (8th Cir. 1945).

Counsel for defendant has assured the district court and this court that there is not now and there will be no further violations. We think the record belies such assurances. The record demonstrates that 15 minors have been illegally employed by defendant subsequent to the filing of the complaint in June of 1976. Even though there exists present compliance, an injunction should issue unless the court can be soundly convinced that there is no reasonable probability of a reoccurrence of the acts. *McComb v. Wyandotte Furniture Co.,* 169 F.2d 766, 770 (8th Cir. 1948). It is obvious from the record in the present case that compliance comes about only through legal compulsion. The record speaks for itself. Defendant has manifested a total indifference to compliance with the Act. Under the circumstances, we

deem it an abuse of discretion for the district court to have failed to issue an injunction.

Defendant urged upon the district court, and with some degree of success, that an injunction will damage its public image and create financial hardship by making it difficult to obtain loans. These are not factors to be weighed in considering whether injunctive relief should issue. *Hodgson v. Taylor,* 439 F.2d 288, 290 (8th Cir. 1971). The fundamental issue is whether the injunction will carry out the Act's objective of abolishing "oppressive child labor."

Furthermore, we fail to see that injunctive relief will bring about the punitive measures defendant claims. An injunction under the Act merely orders the employer to do what the law requires him to do. Issuance of an injunction vel non requires a court to take into consideration the past record of administrative enforcement and whether constant policing by administrative authority has been successful. In the present case, it has not. The injunction should issue.

Judgment is vacated and the case is remanded to the district court with directions to issue injunctive relief in accordance with the Secretary of Labor's prayer for relief.

A true copy.

Attest. CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 79-1750

In the Supreme Court of the United States

OCTOBER TERM, 1979

LANE PROCESSING, INC., PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1550

LANE PROCESSING, INC., PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. Supp. App.) is reported at 606 F. 2d 518. The opinion of the district court (Pet. App. 3a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on January 4, 1980. The petition for a writ of certiorari was filed on April 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals correctly held that an injunction should issue to prohibit petitioner from committing further violations of the child labor provisions of the Fair Labor Standards Act.

STATEMENT

The child labor provisions of the Fair Labor Standards Act (Sections 12(c) and 15(a)(4), 29 U.S.C. 212(c) and 215(a)(4)) prohibit the employment of minors under the age of 16.[1] In June 1976, the Secretary of Labor brought this action in the United States District Court for the Western District of Arkansas to enjoin petitioner, under Section 17 of the Act, 29 U.S.C. 217, from employing underage minors at its chicken processing plants in Grannis, Arkansas, and Broken Bow, Oklahoma.

The Secretary's evidence established a long history of child labor violations at petitioner's two plants (Pet. Supp. App. 2-3). Over a period of eight years, five separate Labor Department investigations at Grannis and four at Broken Bow disclosed that petitioner illegally employed over 200 minors under the age of 16. At various points during these investigations, the Department expressly identified as many as 50 illegally employed children and warned petitioner about the violations. Although each time petitioner promised future compliance, subsequent investigations revealed that petitioner continued to employ some of the identified children and had hired several more. The final investigations disclosed that 23 underage minors were illegally employed at the Broken Bow plant, eight of whom had been identified during a previous investigation, and that two underage minors had been employed at the Grannis plant since the last investigation (*ibid.*). Although petitioner was in compliance with the Fair Labor Standards Act at the time of trial, it had illegally employed 15 children subsequent to the filing of the complaint (*id.* at 4).

[1]Sections 12(c) and 15(a)(4) prohibit the employment of "oppressive child labor," which is defined to include "a condition of employment under which * * * any employee under the age of sixteen years is employed by an employer * * * in any occupation * * *." Section 3(*l*), 29 U.S.C. 203(*l*). Pursuant to authority granted in the same definitional section, the Secretary of Labor has determined that minors between the ages of 14 and 16 may be employed under prescribed conditions in certain occupations, but processing occupations are not among them. See 29 C.F.R. 570.33(a).

Petitioner admitted these recurring violations (Pet. App. 4a), but argued against an injunction on the ground that the violations had ceased and were not likely to recur (*id.* at 5a). The district court refused to enjoin future violations, reasoning that an injunction would damage petitioner's "public image" and could cause financial hardship by hindering petitioner's ability to obtain loans (*id.* at 11a).

The court of appeals reversed. Following its earlier decision in *Brennan* v. *Correa*, 513 F. 2d 161 (1975), it held that in determining whether to enjoin an employer from future violations of the Act, a district court "must exercise its discretion to accomplish the Act's objective of abolishing oppressive child labor" (Pet. Supp. App. 3-4) and must consider the employer's history of past violations to determine whether it is reasonably probable that such violations will recur. Here, the court of appeals said, "[t]he record speaks for itself. [Petitioner] has manifested a total indifference to compliance with the Act. Under the circumstances, [it was] an abuse of discretion for the district court to have failed to issue an injunction" (*id.* at 4-5). The court of appeals dismissed the district court's concerns for petitioner's public image and possible financial hardship as irrelevant to a determination of whether injunctive relief should issue, since neither factor bears on the necessity of an injunction to carry out the Act's objectives.

ARGUMENT

Petitioner contends (Pet. 5-8) that the court of appeals erred in ordering issuance of an injunction because, by the

time of trial, petitioner had adopted a "sophisticated" compliance system to halt future child labor violations. This putative factor, which the district court did not specifically mention as a reason for denying an injunction, is not determinative.

The court of appeals correctly held that even where the employer is in compliance at the time of trial, "an injunction should issue unless the court can be soundly convinced that there is no reasonable probability of a reoccurrence of the acts" so as to effectuate Congress' intent to eliminate oppressive child labor (Pet. Supp. App. 4). It is not the current method an employer uses to eliminate violations that must guide the court, but rather "the employer's previous noncompliance and the dependability of its promise of future compliance" (*Brennan* v. *Correa, supra*, 513 F. 2d at 163 (citations omitted)). In the instant case, there were repeated flagrant violations, both before and after the filing of the complaint, despite petitioner's repeated assurances of future compliance (Pet. Supp. App. 2-3). The court of appeals was clearly correct in concluding, based on the discrete facts of this case, that as to petitioner "compliance comes about only through legal compulsion" (*id.* at 4), and in holding that an injunction was necessary.

Contrary to petitioner's assertion (Pet. 6-7), this result follows from, rather than conflicts with, the court of appeals' own prior rulings. Under each of the varying fact situations in the cases cited by petitioner there was, as here, inadequate assurance of future compliance. In each instance, an injunction was warranted because the employer had failed to secure compliance after warnings by the Department of Labor. See *Brennan* v. *Correa, supra; Goldberg* v. *Kickapoo Prairie Broadcasting Co.*, 288 F. 2d 778 (1961); *Tobin* v. *Anthony-Williams Mfg.*

Co., 196 F. 2d 547 (1952); *Lenroot* v. *Interstate Bakeries Corp.*, 146 F. 2d 325 (1945).

Nor does the decision below conflict with *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419 (1945). In that case, the Secretary unsuccessfully sought to enjoin the use of a method of piece rate compensation incorporated in an employer-employee wage agreement. This Court held that the district court did not abuse its discretion in declining to issue an injunction since the employer had abandoned the disputed wage practice and had entered into a new wage agreement with its employees. Because of the new agreement, there was little likelihood that the employer would resume its earlier practice. In contrast, here there is nothing to ensure that petitioner will not resume its established pattern of using unlawful child labor.

Finally, the decision below is in accord with rulings on this issue in other circuits. Injunctions have issued whenever an employer persists in violating the Act after the Department has issued warnings, even if there is compliance at the time of trial and the employer promises compliance in the future. See *Brennan* v. *Peterson*, 22 Wage and Hour Cas. 294 (10th Cir. 1975); *Brennan* v. *S & M Enterprises*, 505 F. 2d 475 (D.C. Cir. 1974); *Hodgson* v. *Bradley*, 474 F. 2d 1341 (4th Cir. 1973) (table); *Shultz* v. *Salinas*, 416 F. 2d 412 (5th Cir. 1969); *Beneficial Finance Co.* v. *Wirtz*, 346 F. 2d 340 (7th Cir. 1965). In each of these cases the court examined the history of the employer's practices and ordered or sustained an injunction against future violations because the employer had demonstrated a proclivity for unlawful conduct. As the Fourth Circuit said in an analogous situation, "[u]nderstandably, the Secretary has had enough of [the employer's] promises. If [the employer] really intends to

comply with the Act, its future business conduct will in no way be inhibited by an injunction" which, after all, merely requires the employer to obey the law. *Hodgson* v. *Approved Personnel Service, Inc.*, 529 F. 2d 760, 764 (1975) (Age Discrimination in Employment Act of 1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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